IN THE HIGH COURT OF BOMBAY AT GOA
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WRIT PETITION NO. 117 OF 2003
WITH MISC. CIVIL APPLICATION NO. 218/2003

Shri Sebastiao Barreto,
represented by his power
of attorney through his
wife Smt. Maria Ubaldina
de Almeida e Barreto, r/o
Kadamba Guest House,
Buttem Bhat, Merces, Goa. ... Petitioner.

Versus

1. Shri Pedro Paulo Barreto,

2. Shri Cyril Sebastiao Barreto,

3. Shri Ludorico Villa Nova
Sebastiao Barreto,

4. Shri Egipsy Sebastiao Barreto,
all r/o Bondir, Santa Cruz,
Ilhas, Goa. ... Respondents.

Shri V. B. Nadkarni, Senior Advocate with Shri Y. V. Nadkarni, advocate for the petitioner.

Shri M. B. D'Costa, advocate for the respondents.

CORAM : F. I. REBELLO, J.

DATE : 12th June, 2003.

ORAL ORDER

This petition is directed against the orders of the trial Court and the Appellate Court rejecting the application for temporary relief sought by the petitioner against the respondents in respect of the suit premises.

2. There is a suit pending before the trial Court being Civil Suit No.124/99/B filed by the petitioner herein against the respondents who are defendants. The property is of the joint ownership of the plaintiff and defendant no.1.

A business is being carried out in the premises, bearing house no.138, in the name of Kadamba Tourist Home. It is these premises where the business is carried on, which is the subject-matter of the present controversy. The plaintiff filed a suit against the defendants on the ground that the plaintiff had the exclusive right to the business in the suit premises, but on account of his ill-health had sought the services of the defendants to assist him and to run the affairs of the business. The defendants it is contended, taking advantage of the ill-health of the plaintiff started mis-managing the business and no proper accounts have been maintained by the defendants. The premises has 8 rooms and 2 big halls used as tourist home which is given on hire to the tourists after booking the same. The case of the plaintiff is that as there was mis-management of the business by the defendants and as they had not maintained proper accounts, by registered letter of lst June, 1999, addressed to the defendant no.1, incorporated therein, the said facts and brought them to the notice of the defendants. Defendant no.1 did not accept the said notice. By that notice the plaintiff informed the defendants that plaintiff's wife would be supervising the business and the defendants should not supervise the same. The wife of the plaintiff called on the plaintiff to furnish documents, which was not done. Thereafter inspection was done by the wife. It is the further case that on 30th June, 1999 the defendants committed trespass in the house of the plaintiff and threatened the

plaintiff and his wife personally, pursuant to which a police complaint came to be lodged. The suit is based on the cause of action that the defendants have no right to the business and consequently, injunction as sought for. Application was also moved for temporary injunction.

3. The defendants herein appeared and have filed their written statement and also their reply. It is their contention that it is the defendants who are running the business. It was their case, that the defendant no.3 had worked in Kuwait for about 10 years and then in Qatar for about 2 years. It was defendant no.2 who renovated the existing old house in the property for business by starting a guest house. It was their further case that all expenses for modification, construction and furnishing were spent by defendant no.3. The fact that the N.O.C. and licences stand in the name of the plaintiff was explained as set out in paragraph 9 of the written statement. Their further case is that the business of Kadamba Tourist Home and other businesses are the common family business. The defendant no.1 was running a Taverna at Merces, a "Bar Sebastiao" at Panaji was being run by the plaintiff and defendant no.2 and "Kadamba Tourist Home" was being run and managed by defendants no.3 and 4. The income of all these businesses as also other family properties, are put in common pool which is being shared by all the family members.

4. The trial Court after consideration of the material, dismissed the application for temporary injunction. The trial Court mainly proceeded on the footing that the plaintiff had been unable to show that he was in exclusive possession and held that the plaintiff is conducting the business alongwith the defendants, as can be seen from the discussion in paragraph 8 of the judgment of the trial Court.

An appeal came to be preferred before the Additional District Judge, which appeal came to be dismissed by the Appellate Court by the impugned Order dated 28th February, 2003. The learned Appellate Court while dismissing the appeal was pleased to record as under:-

> "This being the case the plaintiff has prima-facie to prove that he or his wife are running the business exclusively. On the contrary the evidence on record prima-facie proves that the defendants are running the business and as such they cannot be dispossessed at the interim stage, moreso when their possession is neither forcible nor unauthorised."

Having said so, the Appellate Court had passed an order directing the defendants to maintain proper registers, accounts and give inspection of the same to the plaintiff as and when required. It is this Order which is the subject-matter of this petition, seeking invocation of Articles 226 and 227 of the Constitution of India. The order which earlier was revisable, now after the amendment to Section 115 of the Code of Civil Procedure, is no longer

revisable.

5. At the hearing of the petition on behalf of the petitioner it is contended firstly that the defendants herein had no title to the property and consequently relying on the judgment of a learned Single Judge of this Court in **M/s. Dattaraj Theatre vs. Shri Sanjay Arjun Pednekar, 1989(1) GoaL.T. 310,** contended, that a rank trespasser would not be entitled to any interim relief. It is also contended that once a prima facie case is made out, the injunction had to follow and for that purpose reliance is sought to be placed on the judgment in the case of **Hindustan Petroleum Corpn. Ltd. vs. Sriman Narayan & Anr., (2002) 5 SCC 760.** It is further contended that once the case of the defendants themselves was that it was a family business, the petitioner herein could not be kept out of the business and consequently direction to maintain registers would clearly disclose an error apparent on the face of the record and hence it is contended that this Court should interfere with the impugned Order. My attention is also invited to the interim order passed in the Appeal which is pending before the Appellate Court, first on 31st January, 2002 and subsequently on 31st July, 2002. The following Order was passed by the Appellate Court:-

> "Heard Shri Amonkar.
>
> The respondents are directed to maintain status quo in interfering with the business of the applicant. Issue notice returnable on

11.2.2002 at 10.30a.m."

That order was continued till the hearing and final disposal of the Appeal.

6. The question is whether the order discloses any error of law apparent on the face of the record and whether this would be a fit case where this Court should exercise its extraordinary jurisdiction and interfere with the orders of the trial and Appellate Courts. The trial Court addressed itself to the principles regarding grant of injunction, may be not very happily. The Appellate Court however, has done so. Merely because a finding is given that the petitioner has made out a prima facie case it does not follow that the injunction should follow. The judgment in the case of **Hindustan Petroleum Corp. Ltd.** (supra) has also so held, though no authority is required for the proposition. A person coming to the Court firstly must prove that he has a prima facie case. Apart from that a person must then also prove the balance of convenience in his favour and lastly, that irreparable loss and injury would be occasioned if injunction is not granted. In case of an injunction to restrain the defendants from interfering with the plaintiff's possession, the plintiff must show exclusive possession. Therefore by holding that a prima facie case is made out, it does not follow that the Court is bound to grant injunction, unless the party is able to satisfy the Court, on the other aspects which have been dealt with above.

In the instant case, based on the material which is on record and on appreciation of that evidence the Appellate Court has recorded a finding that the plaintiff herein was unable to prove his case that he was exclusively in possession and running the business. On the contrary, there is a specific finding recorded that it is the defendants who are running the business. This is purely a finding of fact based on the material. There is no perversity in the findings. There is no error apparent on the face of the record insofar as the said finding is concerned warranting interference by this Court.

7. Insofar as the interim orders are concerned, those would be orders pending the hearing and final disposal of the Appeal. The order of 31st January, 2002 was ex parte. The Order of 31st July, 2002 was to continue that Order, till the the appeal was heard. Once the entire matter was before the Appellate Court, the Appellate Court on considering the matter has passed the Order. Therefore, the mere fact that at an interim stage status quo order was passed would be of no consequence.

8. Coming to the judgment insofar as **M/s Dattaraj Theatre** (supra) is concerned, that is for the proposition that the plaintiff who comes to the Court seeking injunction must show some legal right. In the instant case the petitioner is the plaintiff. There is no dispute that the

property stands in the name of the plaintiff and defendant no.1. The contention of the defendants is as set out in the pleadings earlier that the business in the suit premises was being run by defendant nos.3 and 4. Defendant no.1 has not contested the rights of the defendant nos.3 and 4 in running the business in the premises. In other words, it cannot be said that defendant nos.3 and 4 are rank trespassers in the said premises. Even otherwise, it was the case of the petitioner himself that as he was not well he had asked the defendants to run the business. Their induction was, therefore, not unlawful, even if the case of the petitioner himself is considered. Once that be the case the ratio of the judgment in **M/s. Dattaraj Theatre** (supra) would not be applicable on the facts and circumstances of the case.

9. Next, it is then contended that the Appellate Court by issuing directions for maintenance of the registers and accounts has practically dispossessed the plaintiff from his right of running the business. The Appellate Court has come to a finding that it is the defendants who are running the business and on account of the controversy, the Appellate Court has directed maintenance of the records so that the records would be available when the suit is fully disposed off and considering the reliefs to be granted, if the plaintiff succeeds. I do not find that such directions are contrary to principles of law, or for that matter, that the order suffers from an error apparent on the face of the

record.

10. Lastly, it is contended that the order would have the effect of granting injunction against the petitioner. The petitioner had come to the Court claiming that he was in possession. That has not been accepted. On the contrary, there is a finding that it is the respondents who are running the business. The case of the respondents is that it is a family business, amongst other businesses and that the business in the suit premises was being run by defendants no.3 and 4 though the money for renovation, furnishing, etc. was spent by defendant no.2. Once that be the case, I do not find that the Appellate Court committed any error in issuing the directions it has issued.

There is a Miscellaneous Civil Application taken out by the respondents herein. It is not possible to consider the said reliefs, for if the applicants in the miscellaneous civil application are entitled to any reliefs sought therein, they should move the appropriate forum and not this Court, which is merely considering the legality or otherwise of the orders passed by the courts below.

11. For the aforesaid reasons, I find no reason to interfere with the orders of the Appellate Court. The Writ Petition alongwith the Miscellaneous Civil Application are dismissed.

Learned counsel for the petitioner states that there is an interim ex parte order and that should be continued for six months. The interim order was to direct parties to maintain status quo on 15th March, 2003. Considering the findings of the two fact-finding courts below, I do not find that this is a fit case for continuing the interim order of status quo. Hence application for continuation of status quo rejected.

F. I. REBELLO, J.

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